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United States Government
MEMORANDUM

To: William F. Caton
Acting Secretary

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

From: Linda Dubroof
Acting Chief, Domestic Services Branch
Domestic Facilities Division
Common Carrier Bureau

Subject: CC Docket 92-90, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Date: December 2, 1994

The attached documents relate to matters addressed in the above-referenced docketed proceeding. They are hereby submitted for inclusion in the record of that proceeding.

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U.S. House of Representatives
Committee on Energy and Commerce

SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

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DAVID H. MOULTON
CHIEF COUNSEL AND STAFF DIRECTOR

July 14, 1994

Suzanne 7/18
Advance copy

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

As you may be aware, the Subcommittee on Telecommunications and Finance staff, over the past several months, has been investigating compliance with the Telephone Consumer Protection Act of 1991 (TCPA) by the telemarketing industry. The issuance of the enclosed report concludes the staff's investigation. I call your attention to the report's conclusion that the rules adopted by the Commission may not be working and urge you to reexamine them.

In the course of its investigation, however, staff also identified several issues that related to the TCPA and FCC regulations implementing that law but that went beyond the scope of its report. I am writing in regard to these issues.

Specifically, the Direct Marketing Association and other parties have filed petitions for clarification or reconsideration of several issues (see "Petition for Clarification and Reconsideration of Direct Marketing Association," November 23, 1992; "Comments of Olan Mills, Inc.," January 4, 1993; letter of John F. Sturm, Senior Vice President, Government, Legal and Public Policy, Newspaper Association of America, January 4, 1993; and "Reply Comments Of Direct Marketing Association," January 15, 1993; CC Docket No. 92-90). With a view to safeguarding consumers' rights and in light of the staff report, I strongly urge the Commission to reject the Direct Marketing Association's petition and supporting comments of parties listed above, and make the following recommendations.

- *The Commission should reject the Direct Marketing Association's petition and others' supporting comments for reconsideration of the Commission's decision that "do-not-call" lists be retained on an indefinite or permanent basis.* (*Report and Order* and Docket CC 90-92 at 15)

Petitioners seek to limit the length of time for maintaining "do-not call" lists (DNCLs) to between two and five years, but instead of arguments they offer only hypotheses for changing the

rule. While it is true that some individuals who change phone numbers or relocate may receive a telephone solicitation from businesses that they have requested not call them again, a majority of consumers who fit neither category but who do not wish to receive telephone solicitations would also be affected. Further, alternative means are available to reduce the alleged burden on telemarketers of maintaining permanent DNCLs, for example, look-up companies that flag DNC records and match telephone numbers to ensure that a number is not called, and up-to-date, inexpensive CD-ROMs that contain the names, addresses, and telephone numbers of all individuals in the nation. Both means would facilitate cross-checking DNC requests.

Significantly, moreover, of the numerous companies that indicated in their responses to my questionnaire that they have been maintaining some form of DNCL prior to implementation of the TCPA, staff found not a single complaint concerning problems or difficulties caused by the length of time for maintaining a DNCL. On the contrary, companies often noted with pride that they had acted years in advance of the law in establishing and maintaining permanent, in-house DNCLs. In addition, in an issues document prepared for its government affairs conference in May 1994, the Direct Marketing Association specifically notes concerning the TCPA that "...a large majority of marketers have successfully adapted their procedures to meet the [FCC's] new rules."

Consumers should not be required to bear the consequences of lax industry standards. Changing the rule, especially in light of industry failure in the key areas enumerated in the staff's report, not only would ill benefit consumers but also would open a Pandora's box of potential abuses.

- *The Commission should reject the Direct Marketing Association's petition to reformulate the information disclosure requirement that, in the case of live operator calls, a telephone number or address at which the marketer can be reached should be supplied.* (§64.1200 (e)(2)(iv))

Petitioner contends that this information should be supplied only if the consumer wants it. But petitioner ignores a consumer's right to protect himself or herself from unwanted, repeated calls by the same "marketer" under a different guise. No alteration of the rule and no further comment are necessary.

- *The Commission should reject the Direct Marketing Association's petition that the Commission clarify its intent to allow marketers to place calls to consumers during otherwise proscribed hours, so long as the call is made with the consumer's prior approval or request.* (§64.1200 (e)(1))

Petitioner's efforts to induce the Commission to allow telemarketing calls outside present calling hours, even if only under the special circumstances advocated, would quickly transform an innocuous *and* protective ambiguity into a Trojan

holes, designed to [illegible] limits on calling hours generally, would subvert the law's intent. Indeed, it is possible to imagine a situation where giving one's telephone number for an unrelated reason could be construed as giving prior approval or making a request. Rather, the Commission should restrict telephone solicitations to residential subscribers to the hours between 9 A.M. and 9 P.M. (local time at the called party's location), as opposed to the current limit of 8 A.M. to 9 P.M. Beyond the dislike consumers expressed for receiving telephone solicitations before 9 A.M. local time, this recommendation requires no further comment. Many companies responded that they already observe the new recommended limits in their written policies.

In this connection, strong consumer dissatisfaction with the Commission's interpretation of the phrase "established business relationship" (see staff report, page 14), as exempting a whole class of calls from the rules limiting telephone solicitations, ought to serve as a signal flare of potential abuses. Moreover, concerning this issue, which the Commission considered under exemptions to prohibited uses of artificial or prerecorded messages (see *Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, FCC 92-443, para. 32-35, pp. 18-20), the Commission should revisit its thinking. The proceedings reflect, and the Commission concedes, a certain tentativeness on this matter. For many consumers, the Commission has construed established business relationship far too broadly. Absent a consumer's express written consent, such calls should be prohibited.

In sum, the Commission should reject the petition of the Direct Marketing Association and supporting groups for reconsideration or clarification of several matters, as recommended above.

Thank you for your consideration and cooperation in these matters. I respectfully request that you make this letter a part of the record and share it with your fellow Commissioners.

Sincerely,

Edward J. Markey

Edward J. Markey
Chairman

Enclosure

cc: The Honorable [illegible]

DRAFT

REPORT CARD
ON COMPLIANCE WITH THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 BY TOP COMPANIES IN THE TELEMARKETING INDUSTRY

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A MAJORITY STAFF REPORT

prepared for the use of the

SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

of the

COMMITTEE ON ENERGY AND COMMERCE

U.S. House of Representatives

July 1994

Table of Contents

Executive Summary

The telemarketing industry in the United States generates hundreds of billions of dollars in sales annually, with more than 300,000 telephone solicitors calling more than eighteen (18) million Americans every day. For millions of citizens, however, telephone solicitations constitute an annoyance and invasion of privacy. In order to protect the privacy rights of telephone consumers, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) and ordered the Federal Communications Commission (FCC) to develop rules to implement this law. The resulting FCC rules, which went into effect on December 20, 1992, impose a number of requirements on all commercial telemarketing companies. These requirements include the obligation to:

- Maintain lists of residential telephone subscribers who do not wish to be called.
- Formulate and distribute a written policy for maintaining "do-not-call" lists.
- Inform and train their personnel in the existence and use of such a list in order to ensure compliance with these regulations by all employees of the telemarketing companies.
- Restrict telephone solicitations to residential telephone subscribers to the hours between 8 A.M. and 9 P.M. (local time at the called party's location).

To assess industry compliance with the provisions of the TCPA, the Chairman of the Subcommittee on Telecommunications and Finance surveyed the "Top 50" U.S. telemarketers on what steps they had taken concerning implementation of that law and corresponding and (FCC) rules.

The results of the Chairman's survey are disappointing on three levels: for the telemarketing industry as a whole, for the FCC, and, most importantly, for American consumers. Based on its investigation, the Subcommittee staff issued a report card graphically illustrating these results (see the following page). For example, the industry as a whole earned failing grades in two key areas of compliance with the law and achieved a C-minus (C-) for effort. Among other things, Subcommittee staff found:

- Nearly twenty percent (20%) of companies responding to the Chairman's questionnaire had no written policy for maintaining a "do-not-call" list, as they are required by law to have available upon demand, seventeen months after the FCC rules took effect.
- Numerous companies had inadequate or nonexistent training materials for training employees to maintain a "do-not-call" list.
- Three companies provided astonishing totals of names on their in-house "do-not-call" lists, 2.3 million, 3.4 million, and 5.35 million, respectively.
- Thirty-five percent (35%) of the companies surveyed do not maintain an internal "do-not-call"list.

This report also makes numerous recommendations to the FCC and the telemarketing industry. For example, the FCC should:

- Require telemarketers to maintain a master in-house "do-not-call" list or suppression file, in order both to produce a more uniform national standard than currently exists and to reduce the potential for evasion or abuse of the law.
- Reexamine the issue of creating a national "do-not-call" database, because the current policy of company-specific "do-not-call" lists is ineffective.

In addition, the telemarketing industry and trade association groups should:

- Develop and disseminate a uniform standard for the industry, based on the written policies and training materials of those companies identified in this report as having model procedures for ensuring compliance with the TCPA and FCC rules.
- Ensure that this standard is uniformly observed.

This report raises the question whether additional steps need to be taken not only by the telemarketing industry to achieve a higher degree of compliance with the TCPA and FCC rules, but also by the Commission to effect such compliance. The key findings of the Chairman's survey--inadequate or nonexistent written policies and inadequate or nonexistent training materials--would argue in favor of action to ensure more uniform national standards than now exist. Moreover, a uniform policy could replace an ineffective policy of company-specific "do-not-call" lists and help reduce a continuing chorus of consumer complaints about an industry of vital importance to the American economy.

REPORT CARD

Key Subjects	Grade
Company procedures for maintaining a "do-not-call" list.	A
Companies adequately train employees to maintain "do-not-call" list.	F
Companies have established written policy for maintaining "do-not-call" list.	F

Overall Grade	
Industry compliance with TCPA	C-
Effort	C-

For explanation of grading, see following comments.

Background

In recognition of the expanding role of telephone marketing and in order to protect the privacy rights of telephone consumers while permitting legitimate telemarketing practices, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) (Public Law 102-443)[1] and ordered the Federal Communications Commission (FCC) to develop rules to implement this law. See 47 CFR §64.1200. The resulting FCC rules, which went into effect on December 20, 1992, impose a number of requirements on all commercial telemarketing companies. These requirements include the obligation to:

1) maintain lists of residential telephone subscribers who do not wish to be called;
2) formulate and distribute a written policy for maintaining "do-not-call" lists (DNCLs); and
3) inform and train their personnel in the existence and use of such a list in order to ensure compliance with these regulations by all employees of the telemarketing companies.

In addition, the FCC rules limit the hours for telemarketing and ban the use of prerecorded messages without the consent of the residential subscriber.[2]

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[1]The legislative history of Public Law No. 102-243 (S. 1462, H.R. 1304) is as follows: On March 6, 1991, Messrs. Markey, Rinaldo and other Members introduced H.R. 1304. On April 24, 1991, the Subcommittee held a legislative hearing on H.R. 1304 and related legislation (H.R. 1305, the Telephone Consumer Privacy Act). On May 9, 1991, the Subcommittee reported H.R. 1304, amended, by a voice vote. On July 30 1991, the full committee ordered reported H.R. 1304, amended, by voice vote (H.Rept. 102-317, filed November 15, 1991). On November 18, 1991, the House passed H.R. 1304, as amended, under suspension of the rules, by voice vote. On November 26, 1991, the House passed S. 1462, amended, under suspension of the rules, by voice vote. On November 27, 1991, the Senate passed S. 1462, as amended by the House, by voice vote. On December 20, 1991, President Bush signed S. 1462 (P.L. 102-243).

[2]On December 18, 1992, the United States District Court for the District of Oregon, in *Moser v. FCC*, held that a part of the TCPA violated the U.S. Constitution, and on December 22, 1992, the Court issued a preliminary injunction enjoining the FCC from enforcing §227 (b)(1)(B)--§227 (b)(1)(B) prohibits calls using artificial or prerecorded messages to residential telephone subscribers--of the TCPA pending judicial action on a lawsuit challenging the constitutionality of that section. On May 21, 1993, the district court imposed a permanent injunction on the FCC in this matter. The injunction applies to all states in the

Scope and Methodology

To assess industry compliance with the provisions of the TCPA and corresponding FCC rules, on September 8, 1993, the Chairman of the Subcommittee on Telecommunications and Finance asked the fifty-seven (57) largest telemarketing companies in the industry to provide detailed information on what internal steps they had taken regarding implementation of that law. These companies were selected from a list compiled by *Telemarketing Magazine* (*TM*), an industry publication, and published in its April 1993 issue. *TM* ranked companies on the basis of their total outbound phone lines. Included in this list of "Top 50" is a second category consisting of "in-house" agencies that indicated that fifty (50) percent or more of the telemarketing they do is for their parent company, or for a company that owns an interest in their agency: AT&T American Transtech, Inc.; JCPenney Telemarketing, Inc.; Mass Marketing, Inc.; MCI Consumer Markets (formerly MCI Services); NYNEX Telemarketing Services; Signature Telemarketing; Sprint/United Telephone-Florida; and World Book, Inc.[3]

Ninth Circuit, and affects only FCC enforcement of §227 (b)(1)(B). The FCC is appealing this decision in the U.S. Court of Appeals for the Ninth Circuit.

In a second challenge to the law, *Destination Ventures v. FCC*, the same United States District Court for the District of Oregon (with a different Federal Judge), on January 19, 1994, upheld the constitutionality of §227 (b)(1)(C). This section prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

[3]Companies whose outbound totals were tied were listed alphabetically in the ranking, which gave a numerical total of fifty-three (53). By adding the eight companies in the second category, one obtains a grand total of sixty-one (61). The Chairman surveyed fifty-seven (57) of these companies.

In this connection, it is worth noting that forty-one (41) companies which were ranked among the "Top 50" telemarketers for 1992 also were ranked among the "Top 50" telemarketers for 1993, as published in the April 1994 issue of *TM*. For 1993, seven (7) companies were included in *TM*'s second category of companies comprising the "Top 50," thus giving a numerical total of 57 companies. No companies in 1993 were listed as tied. In 1993, however, the chief criterion for ranking companies changed from outbound calling lines to billable minutes, as verified by each agency's long-distance telephone service providers. Given that billable minutes constitute a more reliable and accurate element of measurement of the amount of telemarketing an agency does, and

Of the fifty-five (55) companies that responded to the survey, staff found four (4) that were not required to respond, thus leaving a total of fifty-one (51) for purposes of analysis and statistical comparison.[4] Finally, although the small number of companies that responded ordinarily would demand that caution be exercised in drawing hard and firm conclusions concerning industry compliance with the provisions of the TCPA and FCC rules, this concern is mitigated by the fact that the companies surveyed include the largest in the industry.[5]

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thus of a company's true size, it is understandable that some companies would consider such information proprietary and choose not to divulge it, for the sake of being included on a "Top 50" list.

In the case of MCI Consumer Markets, as staff ascertained, the company is not included in the 1993 survey because it no longer accepts any outside clients. With the exception of some small contracts due to expire in October, MCI conducts telemarketing only for MCI products and services, and thus does not fall into *TM*'s second category of service agencies. However, when asked by staff, MCI declined to reveal its total number of billable minutes, because it viewed that information as proprietary. Other special circumstances also may have contributed to the failure of some companies to be included on the 1993 list; for example, merger with another company and consequent loss of corporate identity.

[4]Of the four companies not required to respond, two, which serve tax-exempt, nonprofit charitable organizations, nevertheless provided nearly complete responses; a third, which is involved almost entirely in inbound telemarketing, detailed the four instances in which it has been involved in initiating calls to the public since the FCC regulations went into effect; and the fourth, which is involved only in business-to-business telemarketing, provided no information. Except as specifically noted below, therefore, these four companies are not included in the tabulated results.

[5]To give some perspective, one company which ranked among the top twenty telemarketers reported making over seven million calls each month to American consumers.

I. Findings

The "in-house" category of telemarketers, as a group, exhibited the highest degree of compliance with the provisions of the TCPA and FCC rules. But this compliance level towered over the **poor and extremely inconsistent scores** achieved by many of the forty-nine (49) companies remaining in the survey. This fact led to the conclusion that the "Top 50" telemarketers, the largest telemarketers in the industry, earned an overall grade for compliance of C-minus (C-). The staff is confident that this grade is not only fair, but errs on the side of extending the benefit of the doubt to the industry. How the industry earned its low grade is explained below.[6]

The Subcommittee staff's effort to collect data on compliance with the TCPA illustrates the trouble an average consumer may have in exercising his or her rights under the TCPA.[7] For instance, despite a number of efforts and months of trying, the staff was unable to obtain essential information from two (2) of the top telemarketers. The first of these two companies, NTS Marketing, Inc. of Lynchburg, Va., refused to respond and offered no reason for its refusal. The second company, Telnet Systems, Inc. of Fergus Falls, Mn., after previously putting off answering the Chairman's letters, at length provided irrelevant and unresponsive information through legal counsel. Telnet subsequently rejected a further opportunity to correct this situation. Based on staff

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[6]Because of the competitive nature of the telemarketing industry, numerous companies requested that the information they submitted be considered proprietary and confidential. Insofar as possible, this report honors such requests.

[7]Responses to the Chairman's letter of September 8, 1993 were received from thirty-six (36) companies by the date requested, September 20, 1993. On April 20, 1994, the Chairman wrote to the twenty-one (21) companies from which the Subcommittee had not received a response, to reiterate his request that they respond to questions by May 2, 1994. It subsequently emerged that of these twenty-one (21) companies, three (3) had in fact responded by the original date requested but their responses had gone astray, and that two (2) had not received the Chairman's letters because they were misaddressed. On May 4, 1994, the Chairman wrote to twelve (12) companies which had responded to his first letter but had provided unclear or incomplete or, in numerous instances, no responses to several of his questions, to seek additional information and clarification. Finally, between May 12 and May 31, 1994, staff contacted eleven (11) companies which for one reason or another had not responded to either of the Chairman's follow-up letters, and managed to obtain responses from all but two of them.

investigation, therefore, it appears that both NTS and Telnet may be in violation of the FCC rule requiring telemarketers to have available upon demand a written policy.[8]

As a group, this tooth-pulling effort to extract information reflects some of the difficulties in companies' achieving compliance with the law. Further, the substantial additional effort required by staff to obtain information underscores the distance to be traveled by some companies and the trouble average consumers may have in exercising their rights.

The staff investigation found that most companies obligated to comply with the provisions of the TCPA and corresponding FCC regulations are by and large doing so. Some others appear not to comply in all cases and compliance is haphazard at best in the case of many others. Larger, well-known companies, particularly those in the second category of "Top 50" noted above--for example, AT&T American Transtech Inc. (AT&T AmT), JCPenney Telemarketing Inc. (JCPenney), MCI Consumer Markets (MCI), NYNEX Telemarketing Services (NYNEX), Sprint/United Telephone-Florida (Sprint)--included complete, written policies and training materials in their responses. But full compliance with the TCPA and FCC rules also characterized the responses of lesser known companies, for example, TeleSystems Marketing, Inc. (TeleSystems), WATS Marketing, and Gannett TeleMarketing, Inc. (Gannett). Unfortunately, a large number of companies fell far short of this standard.

Training Materials and Written Policies Lacking

The companies that failed to comply fully had inadequate or nonexistent training materials and, similarly, inadequate or nonexistent written policies to inform their workers and customers about their duties and rights under the TCPA. Since training materials and written policies are key to ensuring current and future employees will be aware of consumers' rights and respect such rights, compliance with these areas represented two of the three chief areas for compliance in the Chairman's questionnaire. In both areas, the telemarketing industry as a whole earned failing grades.

To take the written policy area first, nine (9) companies did not provide a copy of their written policy, as requested by

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[8]47 CFR 64.1200(e)(2)(i) states: "Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list."

Neither NTS nor Telnet figure in the statistical tabulation of this survey or are included in Appendix I of companies responding to the Chairman's questionnaire.

the Subcommittee and as they are required by law to have available upon demand. Therefore, based on both staff conversations and correspondence with company officers, these companies had no written policy seventeen months after the FCC rules took effect. In fact, it was clear that these companies created *ad hoc* formal policies only in response to the Subcommittee's repeated inquiries and after receiving extensions of time in which to respond. Despite this effort, however, some companies failed to understand that disposition procedures for coding various calls, or a four-line statement to the effect that a company complies with the TCPA (where even this much exists) do not constitute a formal policy for complying with the TCPA. The issue of inadequate policies is discussed under Question 6, below.

Training Materials Inadequate

Another important area identified in the staff investigation is training materials. Because the turnover rate of telephone sales representatives (TSRs, a common industry term for employees) is extremely high--**from 46.2 percent on average for outbound, business-to-consumer telemarketing units to as high as 400 percent for some companies**[9]--educational materials are clearly very important in providing continuity for dealing with DNC requests. In his survey letter, the Chairman specifically requested that companies furnish copies of such documents or scripts used in educating employees with regard to the DNCL (see below, Question 3). On this component of their overall grade, telemarketers as a whole failed, earning an F.[10] As indicated above, the reason is that numerous companies submitted inadequate materials or, despite repeated requests, submitted no materials or, in some cases, admitted that they did not use written training materials and thus had none to submit.

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[9]See C. Thompson, "Combatting the Telemarketing Turnover Dilemma," *TM* (October 1988), pp.28-29. J.M. Wallace, "The Arithmetic of Outbound Call Processing," *Target Marketing* (December 1993) 38-39, observes that some manual telemarketing operations report as high as 100 percent turnover in a year. Performing repetitive functions, such as dialing and waiting for rings, causes burn-out, according to Wallace. For other factors influencing turnover rates, see L.R. Van Vechten, "Why 65% of Start-Ups Fail," *DM News* (April 4, 1994) 23-24. Van Vechten focuses on telemarketing start-up operations.

[10]As a sidelight, because materials submitted by companies also often treated subjects other than the DNCL, staff was struck at finding numerous examples of harsh penalties prescribed for minor infractions of company policies unrelated to DNC procedures.

Finally, from numerous training materials, a clear and disturbing trend also emerged, in which telephone sales representatives, in effect, were discouraged from volunteering information about how consumers can have their names removed from all client calling lists, unless the consumer *specifically requests* (emphasis supplied) this status. "[S]pecifically requests" are often the operative words in these companies' policies, and their purpose is to reduce DNC requests by establishing excessively narrow language in which to "disposition" calls. For example, the telephone sales representative would "disposition" a call as a "refusal" or something else instead of a "do-not-call" request, unless the customer "...**specifically request**[s] that they [sic] not be called by (client name) again." In another case, one company instructs its telephone sales representatives to volunteer this information to its customers, but to provide it to consumers who are not its customers "...upon request only!" A better policy would be to have the telephone sales representative use common sense in assuming that this is what the consumer wants and proceed accordingly.[11]

[11]Two companies which have such a commendably pro-consumer policy are ITI Marketing Services, Inc. and Lexi International, Inc.

II. Recommendations and Rationale

Drawing on the detailed analysis of responses from the companies surveyed--which follows this section--and, in part, on constituent complaints to elected officials, this report makes two sets of recommendations--first, to the FCC, and second, to the telemarketing industry.

A. Recommendations to the FCC

1. *The FCC should require all appropriate telemarketers to maintain a master in-house "do-not-call" list or suppression file, against which all subsequent new programs are passed for suppression of new DNC requests from future calling.*

Although both the client (the party seeking business) and the telemarketer (the agent) play a role in following the law, it is common sense that the telemarketer, as the chief point of contact between the client and the consumer, should be responsible for maintaining the DNCL, even if the client is ultimately liable for violations of the TCPA and FCC rules. Further, from a regulatory perspective, it is far easier to maintain pressure on the agent to comply with the rules than on the client whose interests the agent serves. While some client organizations require telemarketers in their contracts with them to hold the client organization blameless in the event of violations of the TCPA, staff could not determine from companies' responses to what extent this policy is adhered to throughout the industry. Adoption of this requirement would go far to producing a more uniform national standard than currently exists, while reducing the potential for evasion or abuse of the law; it would accomplish these results without imposing any onerous administrative burdens on companies.

Indeed, in conversations with telemarketing executives, staff ascertained that because their operations are highly automated, compliance with the law presented few or no difficulties. Additional support for this view derives from the fact that of the fifty-five companies that responded to the Chairman's questionnaire, only one made comments concerning increased administrative burdens.[12]

Under current practice, a consumer's request not to be called on client A's list does not transfer to client B's calling list; which is to say, a consumer's request does not result in a global exemption. But both anecdotal evidence and companies' written policies and procedures for collecting DNC requests demonstrate--often unintentionally in the companies' case--that a

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[12]For the relative ease with which telemarketers have been able to comply with the law and FCC rules, see discussion below.

global exemption is precisely what consumers want.

For example, in their responses concerning adding names to the DNCL, companies frequently reported some variation on the following scenario: consumers who receive a call from a telemarketer on behalf of a client and who indicate that they have already requested to be placed on a client company's DNCL will receive a prompt apology from the telemarketer and be footnoted in the system as irate; next, the telephone sales representative (TSR) will repeat the same approved steps for adding these consumers to the company-specific DNCL as for adding consumers who request this status for the first time. But in written complaints to elected officials, the Subcommittee found that consumers want their DNC requests to be honored not merely by companies A or B but by companies A-through-Z. This is the logical explanation for the hypothesis that a client's decision to employ a new telemarketer has resulted in the scenario described above, or that consumers want selectively to halt calls from telemarketers from which they do not wish to hear.

In this connection, staff found that Sprint/United Telephone-Florida maintains a "national" DNCL, which it updates frequently and cross-checks against all new company outbound calling lists. All names resulting from the cross-check with the national list are purged or suppressed from the new company outbound calling list to ensure no attempt is made to contact parties who have expressed a desire not to be contacted. Based on its response to the Subcommittee's questionnaire, MCI also appeared to fit this profile, that is, by maintaining a similar national DNC policy.

While no company can ensure that consumers will never receive calls from other telemarketing companies in the future, a company-specific global exemption will go far toward reducing such calls. Telemarketers have a vested interest in minimizing the number of DNC requests they generate and consumers will not be burdened with periodic calls to renew a DNC request.

> 2. *The FCC should require telemarketers, in addition to their internal, company-specific DNCLs, to use the Direct Marketing Association Telephone Preference Service List (DMATPSL), the DNC files of Private Citizen, Inc., or other recognized suppression files as an edit against all client-specific calling lists.*

As shown in the analysis below, many of the top telemarketers already maintain client- or company-specific DNCLs. In addition, since many of the top telemarketers also already use the DMATPSL or other suppression files, it would not create undue administrative or economic burdens to require *the industry as a whole* to use company-specific DNCLs in conjunction with the

DMATPSL.[13] Further, the American Telemarketing Association (ATA) also supports the DMA Telephone Preference Service and recommends that its approximately 1,200 members use this tool for removing consumers who do not wish to receive telephone solicitations. Industry-wide use of the DMATPSL together with company-specific DNCLs would reduce consumer requests for fewer national sales calls.

On the other hand, staff found, some telemarketers, especially those that do not maintain an in-house DNCL, require their *clients* to use the DMATPSL as a screen against their calling lists, prior to submitting their lists for calling. On the surface, this policy appears useful but is in fact open to abuse, because it interposes a further step to ensuring compliance with the law, to say nothing of increasing the potential for evading compliance altogether. Staff also found many companies that did not themselves use the DMATPSL and did not indicate that they required their clients to use it.

An example will illustrate these points. The following statement, which comprises one company's entire written policy regarding the TCPA and, in its inadequacy, is typical of other companies' policies:

> It is the responsibility of our clients to notify x (company name) if there are individuals on the lists that do not wish to be called under the 'Do Not Call' provisions of F.C.C. regulations. X (company name) will notify the client of

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[13]The DMATPSL allows consumers to reduce national telephone solicitations by providing their name, address (including zip code), and telephone number (including area code) to the **Telephone Preference Service, Direct Marketing Association, P.O. 9014, Farmington, New York 11735-9014.** In turn, the DMA provides this information to companies subscribing to its service, to be used as a screen against calling lists. At the time this report card was issued, an annual subscription to the DMATPSL, including quarterly updates, cost from $280 to $350, depending on the format selected (source: DMA).

It would greatly facilitate matters (and perhaps ease consumers' ire over unsolicited calls), should the DMA furnish an 800-number for consumers to register for the Telephone Preference Service instead of requiring a written request. In this connection, it is worth noting that in their training materials on the DNCL, one company mistakenly assumes the existence of such an 800-number and leaves a space blank for the TSR to supply the number during telephone solicitations, while a second company states that an 800-number for the DMATPSL currently does not exist. For the DMA to furnish such an 800-number would be an important desideratum.

additional names that are to be added to that list during calling.

In light of such evidence, the need to mandate a consistent, uniform standard throughout the industry assumes added urgency.

3. *The FCC should take additional steps to increase consumer awareness of its rules implementing the TCPA and the remedies available to consumers for reducing telephone solicitations.*

For example, by working with pro-consumer organizations such as Consumers Union, publisher of *Consumer Reports*, the Commission could disseminate information more widely.[14] Or by encouraging the telephone companies, in their monthly statements to consumers, periodically to provide information about handling unwanted telephone solicitations, the Commission could enhance greatly the efficacy of its rules.

In its May 1994 statement to *all* its subscribers, Bell Atlantic-Maryland (formerly known as Chesapeake & Potomac Telephone Company) notified consumers about handling unwanted telephone solicitations and, in the process, provided dramatic evidence of a growing problem.[15] In a telephone conversation with a company representative on June 2, 1994, staff ascertained that Bell Atlantic-Maryland, in an effort to satisfy its customers further, took this action as an educational and strictly public relations gesture in response to an increasing number of complaints from subscribers about unwanted intrusions of telemarketers. "It's *the* hot topic of the day," according to a company spokesman. That Bell Atlantic-Maryland should take this step underscores not only how widespread and vexing to consumers unwanted telephone solicitations continue to be, but also how much more needs to be done to reduce them.

From constituent mail to elected officials and anecdotal evidence, staff also found that many consumers are unaware of their rights under both the TCPA and FCC rules. Indeed, at page 30, paragraph 59 of its proceedings on implementing the TCPA, the FCC stated its intention to "...work with consumer groups,

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[14]At least two consumer advocacy organizations deal specifically with this issue: 1) Center for the Study of Commercialism, 1875 Connecticut Avenue, N.W., Suite 300, Washington, D.C. 20009-5728 (Phone: 202-797-7080); and 2) Private Citizen, Inc., P.O. Box 233, Naperville, Il. 60566 (Phone: 708-393-1555, 800-CUT-JUNK).

[15]Bell Atlantic and other local telephone companies publish similar information in the introductory pages of all their directories.

industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized."[16] The FCC should review the effectiveness of its efforts in this regard.

In sum, the FCC should give serious consideration to fine-tuning its rules, particularly with a view to making them more "consumer-friendly" than they currently are: the Subcommittee staff believes that consumers resent being forced to tell each and every telemarketer who calls not to call back. The high number of names on "in-house" lists--**five million-plus on one company's DNCL**[17]--not only debunks industry arguments that "*some* (emphasis supplied) consumers view such calls as an annoyance," or that consumers really do not mind being bothered at home, but also indicates strong interest in a national DNCL.[18] It is scarcely surprising, therefore, that consumers are unaware of the law, since the law does not empower them in the way they would desire. But the law does empower the FCC to do more, and the Commission should consider this information in its review of its rules.

B. Recommendations to the Telemarketing Industry

Significant room for improvement exists within the industry. For example, trade association groups such as the DMA and the ATA should:

> 1. *Make a concerted effort to bring together those companies identified above as having adopted model procedures for ensuring compliance with the TCPA and FCC rules, as reflected in their training materials for employees and written policies.*

These models could serve 1) to develop and disseminate a uniform

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[16]Among its initiatives to enhance consumers' awareness of their rights under the TCPA, the Commission distributed its *Report and Order* implementing the law to telephone companies, state public utilities commissions, consumer groups, state governmental agencies, and industry organizations. Commission staff members also regularly appear at telemarketing industry meetings and provide press and other interviews to increase telemarketers' awareness of their obligations under the TCPA. In addition, the Commission has sponsored a brown bag luncheon and held an off-site workshop on the law, and continues to disseminate its Consumer Alert and Industry Bulletins, as well as the *Report and Order*, in response to public inquiries.

[17]See below, p. 21.

[18]On the issue of a national DNCL, see below, pp. 13-15.

standard for the telemarketing industry, one that not only implements the letter of the law but also abides by its spirit; and 2) to ensure that this standard is uniformly observed.

In this connection, staff found that AT&T AmT demonstrated leadership by disseminating a Standards and Ethics Policy to all personnel and clients, which it has adapted from the *Direct Marketing Association Guidelines for Telephone Marketing* and the ATA *Telemarketing Standards and Ethics Guidelines* (1987).

As previously noted, many telemarketing companies are complying with the law and FCC rules, but as noted above, this effort is mixed. Perhaps the most important area for improvement lies in the training that companies provide to their employees. Given the extremely high rate of turnover of telephone sales representatives (TSRs), proper training represents a *sine qua non* of good compliance.[19] Yet to judge by the skimpy materials submitted by many companies, the industry as a whole is failing in this responsibility. For example, in follow-up telephone conversations with representatives of several companies that had not submitted training materials as requested, staff found that the companies in question did not use written materials but instead relied on an oral and visual (via the computer screen) presentation. Additional deficiencies in this key category are outlined in the analysis of responses to Question 3, below.

In their responses to the Chairman's questionnaire, industry representatives also made several recommendations that Subcommittee staff found noteworthy, including *vigorous enforcement of the TCPA by the Commission.* In addition, telemarketers should:

> 2. *Represent products that are a service and that must be rendered prior to payment by the consumer and, correspondingly, represent services that can be terminated unilaterally by the consumer with no notice and with her/his responsibility only for the portion or service she or he has satisfactorily used up to the date of termination.*
>
> 3. *Use compliance as a performance standard in monitoring TSRs as they conduct business with consumers.*[20]

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[19]Thompson (above, n. 9) observes that training has an impact on turnover, making telephone sales representatives more skilled at what they do--sell. Skilled employees feel good about themselves and therefore are less likely to seek greener pastures. Thompson recommends that training be conducted every week, even if only for fifteen (15) minutes.

[20]As, for example, MCI does.

4. *Maintain a national DNCL.*

III. A National DNCL

According to some industry representatives, maintaining a national DNCL would entail the following steps: 1) Once every three months, all registered telemarketers would transmit their current file to a designated entity. 2) All list brokers (e.g., Donnelley Marketing Inc.) or telemarketing firms that do not have a file or only recently have been established would purchase or receive a copy of this file. Reputable telemarketing companies would welcome updated copies of other companies' files, in order to screen them from their calling campaigns. In addition, list brokers who rent names would be able to use a national DNC file to screen before lists are sold. In the view of some telemarketers, then, following these or similar steps would obviate the need for companies to reinvent the wheel or call people who do not wish to be called and grow aggravated at receiving such calls.

Several of these steps, however, also would violate consumer privacy rights, not to mention the FCC rule requiring a telemarketer to "obtain a residential subscriber's express consent to share or forward the residential subscriber's request not to be called to a party other than the entity on whose behalf a solicitation is made or its affiliate."[21] Viewed in light of this rule, industry suggestions above about sharing consumers' DNC requests with other telemarketers exhibit confusion and ignorance.[22] As such, they also serve to emphasize the task confronting the Commission to publicize its rules more widely both to consumers *and* telemarketers.

Even significantly after the effective date (December 20, 1992) for telemarketing companies to comply with the FCC regulations, Subcommittee staff found that numerous constituents continue to write to their U.S. Representatives and Senators to complain about the "incredible nuisance" and, more importantly, "terrible invasion of privacy" telemarketers have come in their minds to represent. In detailing their mounting vexation at the daily barrage of telemarketing phone calls they receive--sometimes starting as early as 8 A.M. and sometimes ending as late as 10 P.M. (a clear violation of the law)--constituents urged their elected officials to support legislation that would

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[21]See FCC Public Notice, DA 92-1716, page 4. This version restates in only slightly different form the FCC rule found at 47 CFR 64.1200(e)(2)(iii).

[22]In this regard, it appears to staff that the Commission also should explore the possibility that this rule has the effect of thwarting moves toward a national DNCL, because it allows the telemarketing industry to invoke the "privacy issue" as a screen for its opposition to a national database.

establish a national DNC file, as opposed to company-specific files. In fact, Congress passed this legislation, giving the FCC new authority to establish a national DNCL to protect consumers. Although the FCC, under the previous Administration, acceded to industry persuasion (see below) and chose not to implement this provision of the TCPA, it nevertheless retains authority to establish a national database.

These consumers, staff found, viewed the TCPA and accompanying FCC regulations as a first step toward protecting themselves and fellow citizens from marauding telemarketers. A national database allowing consumers to sign up only once while requiring telemarketers to match their list regularly with it would be more foolproof, remedy weaknesses, and close loopholes in the TCPA. In this connection, consumers would benefit from legislation that would: 1) clarify the "business relationship" exception, so as to prohibit such calls without the written consent of the consumer to receive them;[23] and 2) fix a specific period of time, preferably short, within which companies must activate a DNC request.

Although establishing a national DNCL may appear to some telemarketers and many consumers to offer a ready solution to the problem of unwanted telephone solicitations, numerous arguments were raised against its adoption by various industry groups in the course of the FCC's proceedings on implementation of the TCPA. These arguments need not be repeated in detail here, because the FCC devoted considerable attention to them.[24] In short, the FCC concluded that a national DNC database did not offer an efficient, effective, or economic means of avoiding unwanted telephone solicitations, especially in light of an effective alternative (company-specific DNCLs). However, Subcommittee staff has not found company-specific DNCLs to constitute as effective an alternative to a national database, as it was originally contended they would be. Accordingly, staff believes: 1) that the recommendations made above will offer a more effective intermediary stage between a national DNCL and the current policy; and 2) that the FCC may wish to reexamine this issue against the background both of the Subcommittee staff's report and increasing calls by consumers for a national database.

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[23]See 47 CFR 64.1200(f)(4).

[24]See *Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, FCC 92-443, para. 10-16, at pp. 7-10, and para. 20-23, at pp. 13-15 (1992).